

United States District Court  
Eastern District of California

Elliot Eugene Rollings-  
Pleasant,

Plaintiff,

No. Civ. S 03-0228 MCE PAN P

vs.

Findings and Recommendations

Deuel Vocational Ins.,  
et. al.,

Defendants.

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Plaintiff is a prisoner without counsel who claims, pursuant to 42 U.S.C. § 1983, that: (1) March 16, 2002, defendants Rose, Quesada, Valenzuela, Velasquez and Nowak failed to protect plaintiff when they permitted an inmate known to be dangerous to enter an exercise yard without searching him; (2) Nowak failed to protect plaintiff when he permitted the assailant to climb two fences separating exercise yards and attack plaintiff with a knife; (3) when he was attacked, Velasquez and Nowak fired 15

1 shots at plaintiff; (4) defendant Quesada used an entire can of  
2 pepper spray on plaintiff even though the assailant was  
3 attempting to stab plaintiff; (5) defendants Quesada, Thomas,  
4 Rose and Valenzuela failed to protect plaintiff because they  
5 merely ordered inmates to get down but did not otherwise  
6 intervene despite plaintiff's calls for help; (6) defendant Reed  
7 threw plaintiff from a wheelchair while plaintiff was in waist  
8 and leg restraints; (7) defendant Queseda paraded plaintiff  
9 around female guards while plaintiff's pants were down; and (8)  
10 defendants Hernandez, Cox, and Thomas hit plaintiff with their  
11 knees in the back and neck area. Defendants move to dismiss upon  
12 the ground plaintiff failed to exhaust available administrative  
13 remedies.

14 On a motion to dismiss for failure to exhaust available  
15 administrative remedies, the court may look beyond the pleadings  
16 and decide disputed facts. Wyatt v. Terhune, 315 F.3d 1108 (9th  
17 Cir. 2002). 42 U.S.C. § 1997e(a) provides that a prisoner may  
18 bring no section 1983 action until he has exhausted such  
19 administrative remedies as are available. The requirement is  
20 mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001). The  
21 administrative remedy must be exhausted before suit is brought  
22 and a prisoner is not entitled to a stay of judicial proceedings  
23 in order to exhaust. McKinney v. Carey, 311 F.3d 1198 (9th Cir.  
24 2002). Where a litigant requests leave to proceed in forma  
25 pauperis, suit commences when the request is granted. See 28  
26 U.S.C. § 1915(a)(1) (court may "authorize commencement" of suit

1 without prepayment of filing fee for person demonstrating  
2 inability to pay).

3 California prisoners may appeal "any departmental decision,  
4 action, condition, or policy which they can demonstrate as having  
5 an adverse effect upon their welfare." 15 Cal. Admin. Code  
6 § 3084.1(a). The regulations require the use of specific forms  
7 upon which the prisoner must "describe the problem and action  
8 requested," but require no specific content. 15 Cal. Admin. Code  
9 §§ 3084.2, 3085 (designating use of CDC Form 602 Inmate/Parolee  
10 Appeal Form for all grievances except those related to  
11 disabilities under the Americans with Disabilities Act, which are  
12 filed on CDC Form 1824, Reasonable Modification or Accommodation  
13 Request). Prisoners ordinarily must present their allegations on  
14 one informal and three formal levels of review. 15 Cal. Admin.  
15 Code § 3084.5. While presentation on the third level, the  
16 Director's Level of Review, exhausts the remedy for departmental  
17 purposes, 15 Cal. Admin. Code § 3084.1(a), If an appeal is  
18 denied at the first formal level on the ground time limits were  
19 exceeded, the administrative remedy is exhausted because prison  
20 regulations do not provide for further review of an appeal  
21 decided on this ground. Ngo v. Woodford, 403 F.3d 620, 624 (9th  
22 Cir. 2005). Defendant has the burden of identifying the  
23 remedies that remain available. Ibid.

24 June 2, 2002, plaintiff submitted an appeal alleging he was  
25 attacked by an inmate March 16, 2002, was shot repeatedly by  
26 Nowak and Velasquez on order of Queseda and stating his belief

1 that corrections staff several times orchestrated attacks on him  
2 by other inmates in retaliation for filing suit against DVI  
3 officials. He also alleged DVI staff ignored his March 2002  
4 appeal of the attack. He requested medical attention, access to  
5 a telephone to call his family and to seek legal assistance and a  
6 copy of his March 2002 appeal. The informal level of review was  
7 bypassed. June 11, 2002, the reviewer on the first formal level  
8 partially granted the appeal. A physician examined plaintiff and  
9 ordered an orthopedic consultation but plaintiff was told to  
10 discuss use of a telephone with custody staff.

11 June 21, 2002, plaintiff appealed stating he was satisfied  
12 with the medical response but he wanted to know why his March  
13 2002 appeal was overlooked, he wanted a copy of the appeal and he  
14 requested appeals staff to contact custody staff about  
15 plaintiff's use of a telephone.

16 The Chief Deputy Warden cancelled plaintiff's appeal August  
17 8, 2002, upon the ground plaintiff failed to cooperate during the  
18 interview required on the second level of review by interrupting  
19 and arguing with the appeals coordinator. Plaintiff was notified  
20 he could appeal the cancellation to the Director's Level of  
21 Review.

22 November 7, 2004, plaintiff appealed to the Director's Level  
23 of Review, explaining that beginning August 13, 2002, he suffered  
24 from mental illness that prevented him from articulating his  
25 position and several times lost his property because of  
26 transfers. February 25, 2005, the appeal was rejected as

1 untimely.

2 Defendants assert some claims are unexhausted because  
3 plaintiff failed to include in his June 2, 2002, appeal all  
4 allegations made in his civil rights complaint, including the  
5 names of all defendants.

6 The Ninth Circuit has explained that a California prisoner  
7 who correctly completes an appeal form provided by prison  
8 officials provides information adequate to exhaust the  
9 administrative remedy. See Butler v. Adams, 397 F.3d 1181 (9th  
10 Cir. 2005) (A.D.A. claims). Plaintiff described the problem and  
11 action requested on the form provided and so satisfied section  
12 1997e(a).

13 Prison officials partially granted plaintiff's June 2, 2002,  
14 appeal. Even though plaintiff's appeal of the partial denial was  
15 canceled on the second level of review, he had the opportunity to  
16 appeal to the Director's Level of Review and he did so. An  
17 untimely appeal does not defeat exhaustion. Ngo, 403 F.3d at  
18 631. Defendants do not identify any other administrative remedy  
19 that was available to plaintiff. Id. at 626.

20 For these reasons, I find plaintiff exhausted available  
21 administrative remedies.

22 I hereby recommend defendant's January 26, 2005, motion to  
23 dismiss be denied and defendants be directed to file and serve an  
24 answer within 30 days.

25 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
26 findings and recommendations are submitted to the United States

1 District Judge assigned to this case. Within 20 days after being  
2 served with these findings and recommendations, plaintiff may  
3 file written objections. The document should be captioned  
4 "Objections to Magistrate Judge's Findings and Recommendations."  
5 The district judge may accept, reject, or modify these findings  
6 and recommendations in whole or in part.

7 Dated: August 9, 2005.

8 /s/ Peter A. Nowinski

9 PETER A. NOWINSKI  
Magistrate Judge

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